BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NO. 2022-84-WS

IN RE:

SARAH ZITO; ALVARO SARMIENTO, JR.; MARK SHINN; AND DANIEL BERMUDEZ, Complainants, v. STRATA AUDUBON, LLC AND STRATA VERIDIAN, LLC, Defendants.	**DEFENDANTS' PARTIAL MOTION TO DISMISS**

Pursuant to S.C. Code Ann. Regs. 103-829, Defendants Strata Audubon, LLC and Strata Veridian, LLC (the Strata Defendants) move the Public Service Commission of South Carolina to partially dismiss the complaint filed by Complainants Sarah Zito; Alvaro Sarmiento, Jr.; Mark Shinn; and Daniel Bermudez. For the reasons that follow, the Commission should dismiss the fifth, sixth, eighth, ninth, tenth, and twelfth causes of action for want of jurisdiction.

"A challenge to subject matter jurisdiction should be raised by a motion to dismiss . . . ." *Ballenger v. Bowen*, 313 S.C. 476, 478 n.2, 443 S.E.2d 379, 380 n.2 (1994). Subject matter jurisdiction "refers to a tribunal's constitutional or statutory power to decide a case," and it "is a question of law." *Brown v. S.C. Dep't of Health & Human Servs.*, 393 S.C. 11, 16, 709 S.E.2d 701, 704 (Ct. App. 2011) (quoting *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631, 631 (Ct. App. 1993)).

Under South Carolina utility law, the Commission has jurisdiction to decide consumer complaints against public utilities and to remedy situations in which a customer is overcharged

or improperly charged for water and sewer services. *See* S.C. Code Ann. § 58-5-270; S.C. Code Ann. Regs. §§ 103-533 & -733. But it is well settled that the Commission has "no jurisdiction to adjudicate tort claims or to award tort damages." Order No. 2007-277, Docket No. 2006-294-C, at 3 (Apr. 23, 2007); *see also* Order No. 2002-752, Docket No. 2002-298-E, at 2 (Oct. 24, 2002) (recognizing "[t]he General Assembly has not granted this Commission the power to adjudicate" tort claims, and it "has no power to award actual and/or punitive damages"); S.C. Code Ann. § 58-3-140(A) (stating "the commission is vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State").

Here, the complaint—which mirrors the arguments advanced previously in the Court of Common Pleas and the United States District Court for the District of South Carolina—arises out of Complainants' claims that the Strata Defendants are operating a public utility with unapproved rates because of the manner in which the Strata Defendants allocate the cost of water and sewer service to residents of two apartment communities. In addition to claims made related to Title 58, the complaint asserts causes of action sounding in breach of contract, violation of the Uniform Residential Landlord and Tenant Act, negligence, unjust enrichment, and violation of the South Carolina Unfair Trade Practices Act. *See* Compl. at ¶¶ 82–105, 111–41. Because Complainants are improperly attempting to bring tort and breach of contract claims, seeking actual and punitive damages even within their Title 58 claims, and requesting injunctive relief, the Commission should dismiss these claims and requests for relief for lack of subject matter jurisdiction.

Nor can Complainants raise these claims in another forum. After all, a review of the relevant statutes reveals the General Assembly unambiguously vested the Commission with

exclusive authority to handle utility issues and did not intend to create a private right of action. *See* S.C. Code Ann. § 58-3-140; S.C. Code Ann. § 58-5-210; S.C. Code Ann. §§ 58-4-10, -50, -51 & -80; S.C. Code Ann. § 58-5-270; *see also* Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly]."); Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994) ("If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning."). As the district court already held,

> all of Plaintiff's claims depend on whether Defendants are public utilities under South Carolina utility law, and it appears Plaintiffs are merely attempting to disguise their claims for violation of South Carolina utility law as ordinary tort claim and claims under other South Carolina statutes. . . . Plaintiffs may not do so, because South Carolina's utility law provides exclusive administrative remedies to Plaintiffs and does not provide for a private right of action.

Zito v. Strata Equity Grp., Inc., No. 2:20-cv-3808-BHH, 2021 WL 4137553, at *3 (D.S.C. Sept. 10, 2021) (citing *Wogan v. Kunze*, 366 S.C. 583, 623 S.E.2d 107 (2005)); *see also Petition of State ex. Rel. Hutchinson*, 182 S.C. 369, ___, 189 S.E. 475, 477 (1937) (stating "[w]hether a statutory remedy is exclusive" depends "on the intention of the [General Assembly], as shown by the express terms of the statute providing the remedy").

In sum, the only question properly before the Commission is whether Strata was operating a public utility pursuant to the vacated Order No. 1999-37 in *In Re Rule to Show Cause on Submeterers* as urged by Complainants or whether Strata's allocations of utility charges to its tenants does not render it a public utility in keeping with the rational of the final orders entered in *Mill Creek Marina and Campground*, Docket No. 2011-479-E, and *Quail Pointe Apartments*, Docket No. 2007-228-G, and similar matters. Strata respectfully urges the Commission to find the latter dictates the conclusion that Strata was a landlord and was not engaged in the operation

of a public utility. The rest is superfluous and not properly before the Commission.

Accordingly, the Commission should grant the Strata Defendants' partial motion to dismiss the fifth, sixth, eighth, ninth, tenth, and twelfth causes of action from the complaint and grant such other relief the Commission deems necessary and proper.

Dated this 4th day of May, 2022.

/s/Vordman Carlisle Traywick, III
Kevin K. Bell
Vordman Carlisle Traywick, III
ROBINSON GRAY STEPP & LAFFITTE, LLC
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
kbell@robinsongray.com
ltraywick@robinsongray.com

Counsel for Defendants Strata Audubon, LLC and Strata Veridian, LLC